

# GIBSON, DUNN & CRUTCHER LLP

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June 17, 2008

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2008 JUN 19 A 11:50

Client No.

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Thomasenia P. Duncan

General Counsel

Office of the General Counsel

Federal Election Commission

999 E Street, NW

6th Floor

Washington, DC 20463

Re: *MUR 5995*

Dear Ms. Duncan:

Sir Elton John has received the complaint designated as MUR 5995 (the "Complaint"), and hereby provides this response.

As set forth in more detail below, the Complaint is without merit and should be dismissed. The Complaint alleges that Sir Elton John, a foreign national, violated the Federal Election Campaign Act of 1971, as amended, (the "Act") by volunteering to perform a solo concert at a fundraiser held by and for the benefit of Hillary Clinton for President (the "Campaign"). This claim is squarely foreclosed by Advisory Opinions issued by the Federal Election Commission (the "Commission") holding that foreign nationals such as Sir Elton John can volunteer to perform for a campaign, and even solicit funds on behalf of a campaign, without violating the Act or Commission regulations. Therefore, the Complaint fails to allege any facts that, if true, would constitute a violation of the Act or Commission regulations. We respectfully request that the Commission find no reason to believe that a violation of the Act has occurred and dismiss the Complaint.

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## BACKGROUND

On April 7, 2008, Sir Elton John traveled from Las Vegas, Nevada to New York, New York to attend three events: the April 8, 2008 Breast Cancer Research Foundation's Hottest Pink Party Ever event at the Waldorf=Astoria; an April 8, 2008 interview that was pre-recorded for an upcoming television program hosted by Elvis Costello; and the April 9, 2008 event entitled "Elton and Hillary: One Night Only," which is the event at issue in the Complaint.

For many years, Sir Elton John has been a friend of both Hillary and Bill Clinton. Due in no small part to their friendship, Sir Elton John performed a solo concert at Radio City Music Hall in New York, New York on April 9, 2008 entitled "Elton and Hillary: One Night Only" (the "Event"). The Event was a political fundraiser hosted by and for the benefit of the Campaign. Sir Elton John volunteered to perform this solo concert, and he did not receive any compensation for his performance from the Campaign or any other entity.

Aside from volunteering his name, time, and talents for the Event, Sir Elton John was not involved with the Campaign in any way. The Event was planned, organized, and executed by the Campaign. Sir Elton John's involvement in the Event was limited to the direction of his artistic performance and the direct and indirect control of the use of his name and likeness.

On April 15, 2008, Judicial Watch, Inc. (the "Complainant") filed the Complaint with the Commission. The Complaint contains three allegations, each of which are based on Sir Elton John's status as a foreign national. First, the Complaint alleges that Sir Elton John's volunteer performance at the Event constituted a prohibited in-kind contribution to the Campaign by a foreign national in violation of the Act and Commission regulations. Second, the Complaint alleges that Sir Elton John's participation in the Event constituted prohibited involvement by a foreign national in fundraising for a campaign. And third, the Complaint alleges that an e-mail announcing Sir Elton John's volunteer performance at the Event and soliciting contributions, sent by the Campaign in Sir Elton John's name, evinces Sir Elton John's prohibited involvement in the decision-making processes of the Campaign. As detailed below, none of these allegations withstands scrutiny.

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**THE COMPLAINT SHOULD BE DISMISSED**

**I. Foreign Nationals May Volunteer to Give Speeches, Raise Money, and Perform for Campaigns.**

Foreign nationals are permitted to volunteer their uncompensated personal services to campaigns. The Act prohibits a foreign national<sup>1</sup> from directly or indirectly making "a contribution or donation of money or other thing of value . . . in connection with a Federal, State, or local election." 2 U.S.C. § 441e(a)(1)(A) (2008). However, the Act specifically excludes from the definition of the term "contribution" "the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee." 2 U.S.C. § 431(8)(B)(i). As the Commission has repeatedly held, this volunteer exemption to the term "contribution" extends to foreign nationals, thereby permitting them to volunteer their uncompensated personal services to a campaign without making a prohibited contribution. *See, e.g.*, AO 1987-25 at 2 (concluding that "any individual, including a foreign national, may volunteer his or her uncompensated services to a candidate without making a contribution to that candidate").

Foreign nationals may volunteer to provide a wide array of services to campaigns, such as giving speeches and fundraising. In Advisory Opinion 2004-26, the Commission approved a number of ways by which a foreign national may participate in campaign activities on a volunteer basis. *See* AO 2004-26 at 2. Specifically, the Commission concluded that a foreign national may, as an uncompensated volunteer, attend campaign events (such as rallies and fundraisers), solicit funds from persons who are not foreign nationals, and give speeches at campaign events. *See id.* at 2-3. *See also* AO 2007-22 at 3 (concluding that a foreign national's uncompensated performance of various campaign activities, such as soliciting voter support for the candidate, constitutes volunteer activity exempt from the definition of "contribution"). In fact, the Commission has repeatedly concluded that a musician may volunteer his or her uncompensated performance to a candidate without making a contribution to that candidate. *See, e.g.*, AO 2007-08 at 4 (stating that "the value of the performers' services would also be exempted under 2 U.S.C. 431(8)(B)(i) and 11 CFR 100.74 from the definition of 'contribution'"); AO 1980-42 at 2 (concluding that a musician "may agree to provide free services to [a campaign] without the value of those services being considered as a contribution either for limit purposes or for

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<sup>1</sup> The term "foreign national," as defined by the Act, includes "an individual who is not a citizen of the United States or a national of the United States (as defined in section 101(a)(22) of the Immigration and Nationality Act) and who is not lawfully admitted for permanent residence, as defined by section 1101(a)(20) of title 8." 2 U.S.C. § 441e(b)(2) (2008).

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disclosure purposes").<sup>2</sup> On March 17, 2008, the *Washington Post* reported that Bob Biersack, a Commission spokesperson, reaffirmed this conclusion while speaking about Sir Elton John's performance at the Event, stating that "[m]usicians are permitted to donate their time and talents to assist candidates even when the performers hail from foreign soil."<sup>3</sup>

Foreign nationals are only prohibited from engaging in a limited number of activities as an uncompensated volunteer for a campaign – none of which is relevant or applicable here. Foreign nationals cannot participate in campaign decision-making processes with regard to a campaign's election-related activities, which include a foreign national's involvement in the management of the campaign and the campaign's decisions regarding its receipts and disbursements in connection with an election.<sup>4</sup> See AO 2004-26 at 3. Foreign nationals are also prohibited from making a contribution to a campaign, whether from his or her personal funds or by way of an uncompensated contribution of goods. See *id.* See also 2 U.S.C. § 441e(a)(1)(A). For example, the Commission has concluded that "the provision of an original work of art by a foreign national artist to a political committee for use by the committee in fundraising was a contribution and, hence, prohibited by 2 U.S.C. 441e." AO 2007-22 at 6 (discussing Advisory

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<sup>2</sup> These Advisory Opinions do not specifically address whether the value of a *foreign national* musician's services are exempt under the volunteer exemption to the definition of "contribution." Nevertheless, the terms used in 2 U.S.C. § 441e, such as "contribution," are governed by the definitions *and exemptions* codified in 2 U.S.C. § 431, including the volunteer exemption codified at 2 U.S.C. § 431(8)(B)(i). See AO 1987-25 at 2. As the Commission has already determined that the value of a musician's services are exempted from the definition of a "contribution" under 2 U.S.C. § 431(8)(B)(i), we agree with Commission spokesperson Bob Biersack, quoted *infra*, that the value of a foreign national musician's services are similarly exempted.

<sup>3</sup> Matthew Mosk, *Elton John to Croon for Clinton*, WASH. POST, Mar. 17, 2008, at [http://blog.washingtonpost.com/the-trail/2008/03/17/elton\\_john\\_to\\_croon\\_for\\_clinto\\_1.html](http://blog.washingtonpost.com/the-trail/2008/03/17/elton_john_to_croon_for_clinto_1.html).

<sup>4</sup> These prohibitions are derived from 2 U.S.C. § 441e and 11 C.F.R. § 110.20(i), which together "prohibit foreign nationals from participating in the decisions of any person involving election-related activities," including "directing, dictating, controlling, or directly or indirectly participating in the decision-making process of any person, such as a corporation, labor organization, political committee, or political organization with regard to such person's Federal or non-Federal election-related activities, such as decisions concerning the making of contributions, donations, expenditures, or disbursements in connection with elections for any Federal, State, or local office or decisions concerning the administration of a political committee." AO 2004-26 at 3 (internal quotation marks omitted).

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Opinion 1981-51, and analogizing the uncompensated provision of a work of art in Advisory Opinion 1981-51 to the uncompensated provision of printed materials by foreign nationals at issue in Advisory Opinion 2007-22).

**II. The Complaint Should Be Dismissed for Failure to Allege a Violation of the Act or Commission Regulations.**

The Complaint fails to allege any facts that constitute a violation of the Act or Commission regulations. Commission regulations require that complaints filed with the Commission meet certain basic requirements. Specifically, a complaint must "contain a clear and concise recitation of the facts which describe a violation of a statute or regulation over which the Commission has jurisdiction." 11 C.F.R. § 111.4(d)(3) (2008). The Complaint alleges only that Sir Elton John, a foreign national, volunteered to perform at the Event, a political fundraiser, on behalf of the Campaign, and that the Campaign's use of Sir Elton John's name to send an e-mail soliciting support for the Campaign evinces Sir Elton John's prohibited involvement in the decision-making processes of the Campaign. These allegations, however, describe *lawful activity* when viewed in reference to the Act and Commission regulations and Advisory Opinions. Accordingly, the Complaint fails to meet even the simple standard set forth by 11 C.F.R. § 111.4(d)(3), and should be dismissed.

The Act and Commission regulations and Advisory Opinions establish that Sir Elton John's volunteer performance for the Campaign does not constitute a contribution to the Campaign simply by virtue of his status as a foreign national. As detailed above, Commission Advisory Opinions clearly hold that foreign nationals such as Sir Elton John may provide uncompensated volunteer services – including a musical performance and assistance with fundraising– without making a prohibited contribution. *See* AO 2007-22; AO 2007-08; AO 2004-26; AO 1987-25; AO 1980-42.

The Complaint's mischaracterization of Commission Advisory Opinions does not resuscitate these allegations. As described above, the Complaint's reference to Advisory Opinion 1981-51 is misplaced. The Commission has recognized that Advisory Opinion 1981-51 addressed a foreign national artist's uncompensated provision of *tangible goods* to a campaign, which is clearly not analogous to the provision of personal services at issue here. *See* AO 2007-22 at 6. Yet the Complainant relies on this irrelevant Advisory Opinion to support its claims, despite the wealth of Commission Advisory Opinions upholding a foreign national's right to provide uncompensated volunteer personal services to a campaign.

The Complaint's reference to Advisory Opinion 2004-26 is similarly misplaced. The Complainant presumably referenced and attached Advisory Opinion 2004-26 in an attempt to support the claim that the e-mail sent by the Campaign in the name of Sir Elton John evinces his involvement in the Campaign's decision-making processes. However, Advisory Opinion 2004-26 actually states that foreign nationals may solicit financial contributions without violating the

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Act or Commission regulations. *See* AO 2004-26 at 3. Nowhere does Advisory Opinion 2004-26 – or any other Advisory Opinion of which we are aware – state that a foreign national's solicitation of funds on behalf of a campaign "raises a substantial question" as to whether that foreign national was involved in campaign decision-making processes, as the Complaint implies. In fact, the very newspaper article that the Complainant referenced in the Complaint quotes Commission spokesperson Bob Biersack as stating that "foreign nationals may volunteer and may even solicit contributions from non-foreign nationals, provided they are not soliciting other foreign nationals."<sup>5</sup> Yet the Complainant ignores these statements, presumably in an attempt to avoid acknowledging the fatal deficiencies in its claims.

Therefore, under the Act and Commission regulations and Advisory Opinions – as they are, rather than as the Complainant misunderstands them to be – there are no facts alleged in the Complaint that, if true, would describe a violation of the Act or Commission regulations. Accordingly, the Complaint falls far short of even the low bar set by 11 C.F.R. § 111.4(d)(3), and should be dismissed.

### III. Sir Elton John Has Not Violated the Act or Commission Regulations.

Even if the Commission finds that the Complaint satisfies the requirements of 11 C.F.R. § 111.4(d)(3), the Complaint nevertheless should be dismissed, as Sir Elton John's performance at the Event did not violate the Act or Commission regulations. Sir Elton John volunteered to perform a solo concert for the benefit of the Campaign. He was not compensated in any way – either by the Campaign or by any other entity or individual – for his volunteer service. Accordingly, his performance falls within the volunteer activities exempted from the definition of "contribution" by 2 U.S.C. § 431(8)(B)(i) and expressly approved by Commission Advisory Opinions. *See* AO 2007-22; AO 2007-08; AO 2004-26; AO 1987-25; AO 1980-42.

Furthermore, the use of Sir Elton John's name to promote and sell tickets to the Event did not violate the Act or Commission regulations, as the Complaint falsely implies. Foreign nationals, such as Sir Elton John, are permitted to give speeches at campaign events and solicit funds from persons who are not foreign nationals, as long as they do not participate in campaign decision-making processes with regard to a campaign's election-related activities, which include a foreign national's involvement in the management of the campaign and its decisions regarding its receipts and disbursements in connection with an election. *See* AO 2004-26 at 3. Even if Sir Elton John had sent the e-mail soliciting contributions to attend the Event himself – which he did

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<sup>5</sup> "Wash. Times' McCaslin misrepresented FEC spokesman, advisory opinions, to raise questions about Clinton's Elton John Concert," MEDIA MATTERS FOR AMERICA, <http://mediamatters.org/items/200803270011>.

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not<sup>6</sup> – his activities still would not have run afoul of the prohibition against the involvement of a foreign national in campaign decision-making processes with regard to a campaign's election-related activities. *See id.* Despite the Complaint's suggestions, Sir Elton John's involvement with the Campaign was at all times limited to the uncompensated contribution of his volunteer services in furtherance of his performance at the Event, and did not include any prohibited participation in the management of the Campaign or its decision-making processes.

Finally, Sir Elton John did not make any contributions – whether direct or in-kind – to the Campaign pursuant to his performance or otherwise. To the best of Sir Elton John's knowledge, the vast majority of the costs associated with the Event were paid directly by the Campaign, including the costs associated with renting the venue, as well as marketing and producing the Event. Nevertheless, both prior to and after the Event, Sir Elton John and J. Bondi, Inc., the entity responsible for the financial and logistical aspects of all performances by Sir Elton John in North America, reviewed their finances to ensure that any and all costs associated with the Event are paid for or reimbursed by the Campaign. To ensure its compliance with the law, J. Bondi, Inc. invoiced the Campaign both before and after the Event for each and every cost that has been identified as relating to the Event, which total nearly \$67,000.00 to date, and will continue to invoice the Campaign if any additional costs related to the Event are identified. *See Attached Invoices at Exhibit A.* Accordingly, Sir Elton John provided the Campaign only with uncompensated volunteer services as he is permitted to do under 2 U.S.C. § 431(8)(B)(i).

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<sup>6</sup> To the best of Sir Elton John's knowledge, this e-mail was conceived, drafted, and sent by the Campaign, not by Sir Elton John himself.

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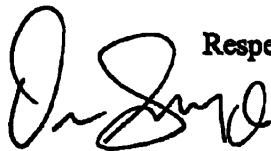
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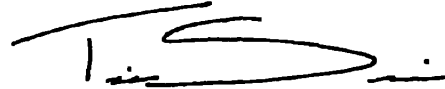
**CONCLUSION**

The Complaint fails to allege any facts that, if true, would constitute a violation of the Act or Commission regulations. The filing of such a meritless complaint not only wastes the Commission's valuable time and limited resources; it victimizes legitimate participants in our political system. Sir Elton John at all times complied with the Act and Commission regulations while generously volunteering his time and talents to the Campaign. Accordingly, we respectfully request that the Commission find no reason to believe that Sir Elton John violated any provision of the Act or Commission regulations and close this matter at its earliest convenience.



Orin Snyder

Respectfully submitted,



Tim Swain

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